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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JIMMY GUTIERREZ, Defendant and Appellant.	B204659 (Los Angeles County Super. Ct. No. NA071565)

APPEAL from a judgment of the Superior Court of Los Angeles County, Joan Comparet-Cassani, Judge. Modified and, as modified, affirmed with directions.

Sylvia W. Beckham, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Scott A. Taryle and Allison H. Chung, Deputy Attorneys General, for Plaintiff and Respondent.

Jimmy Gutierrez appeals from the judgment entered following his convictions by jury on count 1 – second degree robbery (Pen. Code, § 211) and count 2 – assault by means likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(1)), with court findings that he suffered 11 prior felony convictions (Pen. Code, § 667, subd. (d)) and a prior serious felony conviction (Pen. Code, § 667, subd. (a)). The court sentenced appellant to prison for 55 years to life. We modify the judgment and, as modified, affirm it with directions.

FACTUAL SUMMARY

Viewed in accordance with the usual rules on appeal (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence, the sufficiency of which is undisputed, established that on September 7, 2006, appellant entered a jewelry store in Avalon on Catalina Island. Elizabeth Hodge, a store employee, displayed jewelry to appellant. Appellant indicated he wanted to buy jewelry for his girlfriend. He later walked behind the display case where Hodge was and announced he was committing a robbery.

Appellant approached Hodge, but she pushed him away and indicated he was not going to commit robbery. Appellant hit her in the jaw, causing her to fall and strike her head on a concrete safe. Appellant pinned her down and said he was going to kill her. Hodge told appellant, "just take it." Appellant took a necklace from Hodge's neck and additional jewelry from the display case, then fled with Hodge in pursuit. Before appellant exited the store, he defecated on the floor.

Hodge ran down the street, yelling for help. She was pointing at appellant and yelling he robbed her. An employee from a nearby restaurant pursued and detained appellant. During the detention, appellant defecated on himself again. A hotel guest helped detain appellant. Three off-duty Los Angeles police officers later assisted and recovered the stolen jewelry from appellant. Hodge identified appellant at the scene as the robber, and identified him as such at trial.

During cross-examination, appellant asked Hodge if she smelled alcohol on appellant. Hodge replied no. Appellant also asked Hodge whether his speech was clear or slurred. Hodge replied it was clear and articulate. She noticed nothing odd about appellant's behavior.

A Los Angeles County Sheriff's detective interviewed appellant after he waived his *Miranda* rights, and appellant told him the following. Appellant had been hanging around the beach when he saw a jewelry store. He entered it and punched an old lady who was old enough to be his mother. He knocked the woman on the ground and took jewelry. Appellant said he "fucked up," defecated in his pants, and could not believe he had done so. He fled the store. He also disappointed his family. Appellant presented no defense evidence.

CONTENTIONS

Appellant claims (1) he was denied effective assistance of counsel at sentencing, (2) Penal Code section 654 barred punishment on counts 1 and 2, (3) the trial court erred by imposing consecutive terms on counts 1 and 2, (4) the trial court committed *Cunningham* error by imposing said consecutive terms, and (5) appellant is entitled to additional precommitment credit.

DISCUSSION

1. *Appellant Was Not Denied Effective Assistance of Counsel at Sentencing.*

a. *Pertinent Facts.*

(1) *Counsel's Comment About an Alleged Undercover Officer.*

On October 1, 2007, the court called the case for trial.[1] Appellant indicated there would be no defense witnesses. The prosecutor indicated there would be several People's witnesses.

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[1] On March 5, 2007, during a pretrial conference, appellant told the court that he had decided to represent himself after talking with his counsel. Appellant later said, "I just finished speaking to my attorney and what my options were. And there isn't too many." Appellant also indicated there was no other option. Appellant represented himself for a few months, but was represented by counsel at all times on and after October 1, 2007.

After the jury was sworn but before the presentation of evidence, appellant's counsel (counsel) indicated to the court at sidebar that, even though counsel and appellant had spoken numerous times, and even though counsel had reviewed the reports, gone to Catalina, and spoken to the deputies, appellant had just revealed something for the first time to counsel.

Counsel then said, "[Appellant] wanted to know whether . . . one of the witnesses was going to be the person that had been drinking with him. And I asked what he's speaking about, and he said that he had been drinking in a bar prior to going in and committing the robbery. And the person who he was drinking with was an undercover officer. And that after he committed the robbery, the person who captured him was the same undercover officer. But he's not listed in the police reports, and it's not mentioned at all." The prosecutor indicated he thought a food server caught appellant. Counsel indicated there was a large group of people.

The following then occurred, "The Court: I find it shocking that he's waited until the time the jury is selected to come forth with this information so that addresses my credibility greatly [*sic*]; and number two, I don't see the relevance of it. [¶] [Appellant's Counsel]: I don't see it at this time."

(2) *Counsel's Comment About Appellant's Alleged Former Girlfriend.*

On October 3, 2007, after jury argument but before jury deliberations, appellant's counsel stated the following during an ex parte discussion in chambers: "Your Honor, I just wanted to make a record regarding some of the issues that occurred during the investigation. [¶] The investigation was conducted by myself and [an investigator] in preparation for the trial. Mr. Gutierrez always admitted the robbery to us. But just before the trial, he added new facts. And then during the trial, he added the issue of these persons who stopped him being the off duty or allegedly the off duty L.A.P. D. officers. [¶] And then yesterday during the closing argument of the People, he added that there was another witness, being this ex-girlfriend, who he had never brought up as a witness previously."

The following later occurred: "The Court: A witness to what? [¶] [Appellant's Counsel]: To his drinking prior to the robbery and consuming narcotics. He had never raised her existence before in terms of that aspect of the case. I am not going to declare a doubt as to his competency because I believe he's completely competent. But I do believe he suffered some sort of brain damage. [¶] What I'd like to do is go forward. I expect him to be convicted. And at that time, I'd like to put over sentencing to have him tested just to make absolutely sure there's no brain damage. And if there's brain damage, that would be to perhaps issue [*sic*] of sentencing, and that would be it."

The court stated: "What I find to be problematic is that we have an individual who is facing life, who has 11 strikes, who has not given you any of this information until the moment of trial. And I mean, once the jury is in the box and selected, he's come forward with all this information. There is absolutely no evidence in the record before me indicating that he had consumed alcohol, . . . that he had any symptoms of being under the influence. [¶] So I tend to think that this information that he's giving you now is his attempt to delay that which he sees as inevitable, that is his incarceration for life. [¶] Of course as counsel, you must investigate everything and you must do your duty. But I am very skeptical as to the validity of any of these assertions. In my opinion, you've handled yourself in the case appropriately. But certainly, I'll give you whatever time you feel is necessary."

(3) *Additional Proceedings and Sentencing.*

After the jury convicted appellant as indicated, the court asked appellant if he wanted a jury or court trial on the prior conviction allegations. Counsel said, "He wants to know whether or not the court would consider a *Romero* motion if he were to admit these strikes. He wants to see if the court will strike some of the strikes at a later date. [¶] And I told him, that's up to the court."

The court stated, "Sir, you have 11 strikes. There's no case authority that I am aware of that would permit me to strike . . . 10 of 11 strikes, especially when you just got out of prison and committed a new –- you're in prison 30 years, and you come out and commit a crime within six months. It would be abuse of discretion for me to strike 10 of

11 strikes under those circumstances. I know of no case that would permit that, sir. Absolutely not. [¶] So I cannot in good faith tell you that I would really consider a *Romero* motion." Appellant elected to have a court trial on the prior conviction allegations.

At the sentencing hearing on December 5, 2007, the court found true the prior conviction allegations. In particular, the court found the following. In case number "A559266," appellant had suffered nine convictions for robbery. He also suffered two convictions for kidnapping to commit robbery with, as to one such conviction, a true finding as to a Penal Code section 12022, subdivision (b) allegation. Appellant was sentenced in all of these cases in June 1980. The trial court in the present case found that these 11 convictions were strikes.

In the present case, the court sentenced appellant to prison for 55 years to life, consisting of a term of 25 years to life, pursuant to the "Three Strikes" law, as to each of counts 1 and 2, and the court imposed the terms consecutively. The court also imposed a five-year Penal Code section 667, subdivision (a) enhancement. Counsel did not (1) ask the court to consider dismissing any strikes, (2) object to multiple punishment on counts 1 and 2, or (3) object to the imposition of consecutive sentences on those counts. We will present additional facts below where pertinent.

b. *Analysis.*

Appellant claims his trial counsel provided ineffective assistance of counsel by violating the attorney-client privilege when, on October 1, 2007, counsel disclosed communications between appellant and counsel concerning the undercover officer and, when, on October 3, 2007, counsel disclosed communications between appellant and counsel concerning appellant's former girlfriend. Appellant also claims counsel provided ineffective assistance by failing (1) to ask the court to dismiss any strikes, (2) to object to multiple punishment on counts 1 and 2, and (3) to object to imposition of consecutive sentences on those counts. He argues the alleged ineffective assistance was prejudicial to sentencing because counsel's statements infuriated the court, affecting its judgment during sentencing. We reject appellant's claims.

(1) *Applicable Law.*

" 'A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction . . . has two components.' [Citations.] 'First, the defendant must show that counsel's performance was deficient.' [Citations.] Specifically, he must establish that 'counsel's representation fell below an objective standard of reasonableness . . . under prevailing professional norms.' [Citations.]" (*People v. Ledesma* (1987) 43 Cal.3d 171, 216.) "In addition to showing that counsel's performance was deficient, a criminal defendant must also establish prejudice before he can obtain relief on an ineffective-assistance claim." (*Id*. at p. 217.) Moreover, on appeal, if the record sheds no light on why counsel acted or failed to act in the manner challenged, unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation, an ineffective assistance contention must be rejected. (*People v. Slaughter* (2002) 27 Cal.4th 1187, 1219.)

Evidence Code section 912, subdivision (a) states, "Except as otherwise provided in this section, the right of any person to claim a privilege provided by Section 954 (lawyer-client privilege), . . . is waived with respect to a communication protected by the privilege if any holder of the privilege, without coercion, . . . has consented to disclosure made by anyone. Consent to disclosure is manifested by any statement or other conduct of the holder of the privilege indicating consent to the disclosure, including failure to claim the privilege in any proceeding in which the holder has the legal standing and opportunity to claim the privilege."

(2) *Application of the Law to This Case.*

For sake of brevity, we will state here that, as to each of appellant's arguments discussed below: (1) we reject the argument on the ground the record sheds no light on why counsel failed to act or acted in the manner challenged, counsel was not asked for an explanation, and we cannot say there simply could have been no satisfactory explanation; therefore, no ineffective assistance of counsel occurred. In our discussion below, we will provide additional reasons why no ineffective assistance of counsel occurred.

(a) *Counsel's Comment About the Alleged Undercover Officer*.

As to counsel's comments about the undercover officer, counsel did not raise this issue on his own initiative. Counsel told the court "[Appellant] wanted to know" whether the undercover officer who had been drinking with him was going to be one of the witnesses. The fact, if true, that appellant drank with an officer prior to the robbery would have been a fact uniquely within the knowledge of appellant. Appellant does not explain how counsel could have asked the court if the officer who allegedly had been drinking with appellant would be one of the witnesses without counsel implying (1) it was appellant who told counsel about the alleged drinking and (2) appellant wanted counsel to disclose the alleged fact to the court. Appellant himself never expressly objected to counsel's comments.

The fact, if true, that appellant had been drinking with an officer who had not been identified in police reports would have presented issues beneficial to appellant. These issues included whether (1) the People had violated discovery rules, (2) appellant was voluntarily intoxicated to the point it negated intent to steal, and/or (3) whether voluntary intoxication was a mitigating factor for purposes of sentencing.

In sum, the record demonstrates appellant, for his benefit, consented to counsel telling the court that (1) appellant told counsel that, before appellant robbed Hodge, he had been drinking with an undercover officer, and (2) appellant wanted to know if the officer would be one of the witnesses. To that extent, appellant manifested an intent that his communications with counsel be revealed, waived any attorney-client privilege, and consented to the disclosure. (Cf. *People v. Clark* (1993) 5 Cal.4th 950, 1005-1006*; Klang v. Shell Oil Co*. (1971) 17 Cal.App.3d 933, 938; Evid. Code, § 912, subd. (a).) Appellant has failed to demonstrate constitutionally deficient representation. Nor has he demonstrated the trial court was anything but impartial in its response to counsel's comments, or that they infuriated the court or impacted sentencing.

Moreover, appellant apparently acknowledged in March 2007 that, given the facts in his case, there were not too many options, suggesting conviction and sentencing were highly likely. When counsel told the court about the undercover officer, the court found the alleged fact to be irrelevant.

Further, during cross-examination by appellant at trial, Hodge denied she smelled alcohol on appellant, testified his speech was clear and articulate, and denied noticing anything odd about his behavior.

Appellant does not challenge the sufficiency of the evidence that appellant robbed Hodge of jewelry. Hodge pursued appellant. She was yelling appellant robbed her and pointing at him. A citizen gave chase and detained him. The persons detaining appellant ultimately included three off-duty police officers. The officers found the stolen jewelry in appellant's possession. Appellant defecated in the store and defecated in his pants when detained. Appellant later admitted to a deputy that appellant knocked the victim down, took jewelry, and defecated before he left. Accordingly, even if counsel violated appellant's attorney-client privilege with the result that counsel's representation of appellant was constitutionally deficient, no prejudice resulted because the evidence of appellant's guilt was overwhelming; therefore, appellant was not denied effective assistance of counsel.

(b) *Counsel's Comment About Appellant's Alleged Former Girlfriend.*

As to counsel's comments about the alleged former girlfriend, again, the record demonstrates that appellant, for his benefit, wanted counsel to tell the court that his alleged former girlfriend had witnessed his consumption of alcohol and use of narcotics prior to the robbery. The fact, if true, that appellant had done so might have been grounds for appellant to reopen his defense on the issue of intent to steal, and/or might have been a mitigating factor for purposes of sentencing. Again, appellant himself never expressly objected to counsel's comments.

It also appears from the record, however, that counsel revealed this information to the court, not because counsel found the information credible, but because counsel

viewed appellant's latest exculpatory offering as part of a pattern suggesting his mental competence might be questionable. Counsel's comments indicate he was explaining why he was not seeking the court to declare a doubt as to appellant's incompetence but instead was going to present any evidence of appellant's mental deficiency at sentencing.

In sum, the record demonstrates that appellant, for his benefit, and continuing a pattern of providing belated alleged exculpatory facts, consented to counsel telling the court that appellant told counsel that appellant's former girlfriend witnessed his consumption of alcohol and use of drugs. To that extent, appellant manifested an intent that his communications with counsel be revealed, waived any attorney-client privilege, and consented to the disclosure. No constitutionally deficient representation occurred. Nor has appellant demonstrated the trial court was anything but impartial in response to counsel's comments, or that they infuriated the court or impacted sentencing.

Moreover, counsel did not indicate how long prior to the robbery appellant allegedly had drunk alcohol or used drugs, how much alcohol appellant allegedly drank, or what kind of drugs he allegedly used. The court concluded appellant's belated presentation of exculpating evidence concerning his former girlfriend was dubious and dilatory and, for reasons discussed previously, the evidence of appellant's guilt was overwhelming. Even if counsel's comments about appellant's alleged former girlfriend violated his attorney-client privilege with the result that counsel's representation of appellant was constitutionally deficient, no prejudice resulted; therefore, appellant was not denied effective assistance of counsel.[2]

(c) *Counsel's Failure to File a Romero Motion and Remaining Issues.*

Appellant claims his counsel was inadequate because he failed to move to strike, pursuant to Penal Code section 1385, all but one of appellant's strikes. We disagree. The court, which is presumed to have read the probation report (cf. *People v. Black* (2007)

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[2] We note appellant does not complain that his counsel advised the court that (1) appellant wanted to know if the court would consider a *Romero* motion and (2) counsel indicated to appellant that the matter was up to the court.

41 Cal.4th 799, 818, fn. 7), was aware of appellant's extensive criminal history. Counsel may well have felt such a motion would have been futile in light of that history. Appellant concedes he did not lead a legally blameless life when he was on parole; in 2003, he was convicted of drunk driving, leaving the scene of an accident, and driving without a valid driver's license. (See *People v. Humphrey* (1997) 58 Cal.App.4th 809, 813.)

The trial court would not have abused its discretion by denying such a motion. (See *People v. Williams* (1998) 17 Cal.4th 148, 158-164; *People v. DeGuzman* (1996) 49 Cal.App.4th 1049, 1054-1055; *People v. Askey* (1996) 49 Cal.App.4th 381, 389.) Indeed, we conclude (like the trial court did) that if the trial court had granted such a motion, that act would have been an abuse of discretion. No ineffective assistance of counsel occurred here.

Appellant also claims he was denied effective assistance of counsel because his counsel failed to object to (1) multiple punishment on counts 1 and 2, and (2) imposition of consecutive sentences on those counts. There is no need to reach the issues in light of our conclusion below that Penal Code section 654 barred multiple punishment on these counts.

2. *Multiple Punishment on Counts 1 and 2 Was Improper.*

Hodge was the victim as to each of counts 1 and 2. Respondent concedes Penal Code section 654 barred multiple punishment on those counts, because the robbery, and the assault by means likely to produce great bodily injury, were part of an indivisible transaction. (Cf. *People v. Amin* (1978) 88 Cal.App.3d 637, 641 .) We will modify the judgment accordingly.

3. *Appellant Is Entitled to Additional Precommitment Credit.*

Appellant was arrested on September 7, 2006, and remained in custody until the court sentenced him on December 5, 2007, a total of 455 days, inclusive. The trial court awarded appellant 522 days of precommitment credit, consisting of 454 days of custody credit pursuant to Penal Code section 2900.5, subdivision (a), and, pursuant to Penal Code sections 2933.1, subdivision (c), and 4019, 68 days of conduct credit.

Appellant claims he is entitled to a total of 523 days of precommitment credit, consisting of 455 days of custody credit, plus 68 days of conduct credit. We agree. (Cf. *People v. Ramos* (1996) 50 Cal.App.4th 810, 817; *People v. Bravo* (1990) 219 Cal.App.3d 729, 731; *People v. Smith* (1989) 211 Cal.App.3d 523, 527.)[3]

DISPOSITION

The judgment is modified by staying execution of sentence on appellant's conviction for assault by means likely to produce great bodily injury (count 2) pending completion of his sentence on his conviction for second degree robbery (count 1), such stay then to become permanent, and by increasing appellant's total precommitment credit award to 523 days, consisting of 455 days pursuant to Penal Code section 2900.5, subdivision (a), and 68 days of conduct credit pursuant to Penal Code sections 2933.1, subdivision (c) and 4019. As so modified, the judgment is affirmed. The trial court is directed to forward to the Department of Corrections an amended abstract of judgment reflecting the above modifications.

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KITCHING, J.

We concur:

KLEIN, P. J.

CROSKEY, J.

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[3] In light of the above, there is no need to address appellant's claims that concurrent and not consecutive terms are proper as to counts 1 and 2, and that imposition of consecutive sentences was error in violation of *Cunningham v. California* (2007) 549 U.S. 270 [166 L.Ed.2d 856].